IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No. 9159 of 2005
with
CIVIL APPLICATION No. 4636 of 2005

For Approval and Signature:

HONOURABLE MR.JUSTICE C.K.BUCH

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1	Whether Reporters of Local Papers may be allowed to see the judgment ?	
2	To be referred to the Reporter or not ?	
3	Whether their Lordships wish to see the fair copy of the judgment ?	
4	Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?	
5	Whether it is to be circulated to the civil judge ?	

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VIDECON NARMADA ELECTRONICS LTD & 1 - Petitioner(s)

Versus

NAVBHARAT FERRO ALLOYS LTD & 1 - Respondent(s)

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Appearance :
MR RK MISHRA for Petitioner(s) : 1 - 2.
MR KM THAKAR WITH MISS ANAR PARIKH FOR M/S TRIVEDI & GUPTA for Respondents.

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CORAM : HONOURABLE MR.JUSTICE C.K.BUCH

Date : 07/09/2005

COMMON ORAL JUDGMENT

1.Heard Mr.R.K. Mishra, learned counsel appearing for the petitioners and Mr.K.M. Thakar, learned

counsel appearing with Miss Anar Parikh, learned counsel on behalf of M/s.Trivedi and Gupta for the respondents.

2. Invoking jurisdiction of this Court under Article 227 of the Constitution of India , the petitioners-orig.defendants of Special Civil Suit No.97 of 1997 have prayed that this Court should exercise powers and should quash and set aside the order dated 16th April, 2005, passed below Exh.103 by the ld.Civil Judge (S.D.) and permit the petitioners-orig.defendants to submit their written statement in the Suit pending with the Court. The application Exh. 103 was submitted by the petitioners-orig.defendants stating that due to the mistake committed, the petitioners could not submit their written statement and, therefore, they may be permitted to file their written statement. The mistake in the application has been explained by way of an affidavit dated 01st October, 2003 of one Shantilal Ganeshbhai Prajapati, wherein the deponent has stated that he, being a clerk of the

advocate of the concerned matter, has erred in not submitting the written statement in the Suit i.e. Special Civil Suit No.97 of 1997 and, therefore, it is the say of the present petitioner that the ld.Civil Judge accepting the explanation ought to have extend the time to file the written statement and ought to have permitted the petitioners as the amount involved is very high and the dispute centres around number of controversial issues and non-availability of written statement by the petitioners may cause serious prejudice to them. The Court has admitted this petition and after admission of the petition, the petitioners have prayed by way of abovementioned Civil Application that till hearing and disposal of the present petition, the proceedings of Special Civil Suit may be stayed. But as today, the Court has heard the submissions of the learned counsel appearing for the parties in detail, both these proceedings i.e. Special Civil Application as well as Civil Application are being disposed of by this common judgment and hence, this judgment.

3.For the sake of brevity and convenience, I would like to quote main reliefs as prayed for in petition in paragraph no.8, which are as under :

> **“8(A)** Your Lordships may be pleased to quash and set aside the order below Exh.103 passed in the Special Civil Suit No.97/1997 vide Annexure-”D” dated 16.4.2005 passed by the Second Joint Civil Judge (S.D.), & J.M.F.C., Bharuch.
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> **8(B)** Your Lordships may kindly be pleased to pass any other further order/s as are deemed fit, just and proper in the facts and circumstances of the case and in the interest of justice.”

4.At one point of time, Mr.R.K. Mishra, learned counsel appearing for the petitioners, has

submitted that while permitting the present petitioners this Court may award exemplary costs against the present petitioners and the same may be even more than Rs.50,000/-. But a mistake committed by an advocate or his clerk should not result into utter miscarriage of justice. Mr.R.K. Mishra has taken me through the order under challenge and the nature of dispute between the parties; especially the decision in the case of ***Kailash v. Nanhku and others, reported in 2005 AIR SCW 2346***. Mr.Mishra has taken me through the relevant paragraphs of the said decision and has read relevant head-notes “E”, “F”, “G”, “H”, “I”, “J”, “K” and “L” of the cited decision and has hammered that the embargo in Order 8 Rule 1 created by the amended Code of Civil Procedure should not be construed as a mandatory scheme and as observed by the Apex Court, it may be held to be a directory in the background of the facts and circumstances of the present case and the petitioners may be permitted to submit the written statement. The Apex Court in the decision of the Kailash (supra) has summarized the conclusion in

paragraph:46 of the decision. I have carefully gone through the same. With a view to appreciate and elaborate the submissions made by Mr.R.K. Mishra, I would like to reproduce certain portions of the order under challenge because while exercising the jurisdiction vested with the Court under Article 227 of the Constitution of India, the Court shall have to reach to a finding that there is an element of either perversity or patent illegality in the finding or if the finding is not reversed then gross injustice would be caused to a party approaching Court. The ld.Civil Judge while rejecting the application Exh.103 has narrated some details referring to the dates which are found relevant by him. I would like to reproduce some of the portion of the order under challenge, which reads as under :

> *"4. If we read Exh.103 was filed on 10.9.2003. In this application only one reason for not filing written statement has been given by the defendant and that is mistake (Sharat*

Chuk). By what kind of mistake written statement was not file within time that has not been clarified by the defendant. Surprisingly, after filing this application at Exh.103 on 10.9.2003, an affidavit at Exh.107 dated 01.10.2003 I.e. after 20 days was produced on record. This affidavit has been sworn in by Shantilal Ganehsbhai Prajapati. It is declared by him that he is Advocate's clerk and earlier a written statement was filed on behalf of the Defendant Videocon Company in the another suit, but by misunderstanding it was filed in this suit and accordingly due to his mistake and negligence the written statement was not filed. Further, he has stated that he has put note on the brief that written statement has been filed. This happens due to his mistake and negligence and now came ot the knowledge of the Advocate, therefore, at present written statement has been

filed. Now, if we compare the contentions of Exh.103 and 106, there is no consonance between both. Nothing he has stated in application Exh.103 that written statement was not filed due to the mistake and negligence of the Advocate's clerk. Even no facts as to filing of written statement of the other suit has been contended in this application. So, it appears that after filing an application at Exh.103, this affidavit with a view to support the application has been filed by Shantilal Ganeshbhai Prajapati. There is no statement in application whether Mr.Shantilal Ganeshbhai is registered clerk of an Advocate for the Defendant Mr.R.D. Purohit. He has not produced his Identity Card or his registration certificate along with the affidavit.... .

5. ... Learned Advocate for the Defendants has placed reliance on 1984

Supreme Court, Page-41- Smt. Lachi Tewari and Others, Appellants V/s Director of Land Records and Others, Respondents. In this case, the petition for restoration was rejected due to the absence of the petitioner. It was held that under our present adversary legal system, where the parties appear through their Advocates, the obligation of the parties is to select his advocate, brief him, pay the fees demanded by him and then trust the Learned Advocate to do the rest of the things The party may be a villager or may belong to a rural area and may have no knowledge of the Court's procedure. After engaging a lawyer, the party may remain supremely confident that the lawyer will look after his interest. In the case before me, the Party is a Company. Even Company has Law Officer and they are looking after all the Legal proceeding on behalf of the Company. Therefore, here in the case

before me, the Defendant is not a villager or belong to a rural area, or having no knowledge of the Court's procedure. Further, in the case before me, the matter has not been dismissed in absence of the Advocate for the defendant. On the contrary, Learned Advocate for the defendant has already cross-examined the Plaintiff as well as Witness.....

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7. ... In all the above referred judgments, it is held the right of filing the written statement has been forfeited after the first days of hearing. The Defendant should not be permitted to earn premium on its lethargic and insufficiency. The Court can not exercise its discretion to allow the Defendant to file written statement who failed to show on sufficient ground for not filing

written statement within time and if the Court come to the conclusion that final order to be given for filing written statement, an amount claimed in the suit should be ordered to be deposited. Further, when the Defendant has got opportunity of cross-examination the plaintiff or his witnesses, he will not suffer any damage or no injustice caused to him. If we take in to consideration the ratio laid down in all above referred judgments, it becomes clear that there must be proper and sufficient reason for not filing written statement in time. In the case before me, time to file written statement was already over before 5 years. Thereafter also defendant has not produced his written statement. The plaintiff has produced oral evidence as well documentary evidence in the suit. Therefore, now if defendant permitted to file written statement the Plaintiff will have no

opportunity to give evidence regarding contentions of the written statement. In that circumstances, I do not think it proper to permit to defendant to produce his written statement. In the discussion above, I find no substance in the application, there is no sufficient ground for not filing written statement for such a long period of more than 5 years.

8. ... The question arise that whether the amended provision of Order-8, Rule-1 applied to the case before me? This case was instituted in 1997 and amended provision has no retrospective effect, therefore, it will not be applied, considering the date of service of summons, but amended provisions of Order-8, Rule-1 become applicable to all Civil Suits from 01.07.2002 and therefore, after that date no written statement can be filed

after the lapse of statutory period. The Civil Court will have no discretion to permit such written statement to be taken on record filed after prescribed period. In this view of the matter also the Court has no discretion to permit belated filing of written statement i.e. after period fixed by the statute, 90 days."

5. Therefore, it is difficult for this Court to say that the application Exh.103 has been dismissed in a cryptic manner and without assigning detailed reasons. On the contrary, it emerges that the learned Judge has considered all relevant aspects including one fact that the day on which the right to file written statement was closed, newly amended Rule 1 of Order 8 of the Code of Civil Procedure was not in operation but after closure of the evidence of the plaintiff and after 01st July, 2002, the day on which the amended provision of Rule 1 of Order 8 of the Code of Civil Procedure came into operation, certain dates were granted to the defendant so that he can produce his side of

evidence and thereafter, on 10th September, 2003, the application Exh.103 came to be filed and that too with a small fake reason that the defendant should be permitted to file written statement as because of some mistake, the defendant-company could not file written statement.

6. The said application Exh.103 does not disclose the name of the clerk who committed mistake. It is not even explained as to which is the other suit in which the defendant-company had filed written statement by mistake. Even today Mr.R.K. Mishra was not able to point out this aspect when specific query was raised during the course of hearing. This Court cannot ignore the fact that an advocate gets up to cross-examine the plaintiff or its witnesses in a contested matter involving huge amount, does not have a written statement in his hand. How an advocate for the defendant can cross-examine the plaintiff unless he is aware about the stand of the plaintiff as party defendant. So it will be difficult for this Court to believe that till September, 2003, the day on which the matter was to

be argued finally as to the evidence of the defendant's side was ordered to be closed, the learned counsel for the defendant came to know that his clerk has committed mistake in not filing the written statement and has put a written endorsement on the docket that the written statement has been filed in the present suit i.e Special Civil Suit No.97 of 1997. So this is a case, wherein the defendant is requesting this Court to permit him to file a written statement under a falsehood. At this stage, I would like to reproduce the relevant paragraph of the decision in the case of Kailash (supra) where the Apex Court has observed as under :

> *“41. Ordinarily, the time schedule prescribed by Order VIII, Rule 1 has to be honoured. The defendant should be vigilant. No sooner the writ of summons is served on him he should take steps for drafting his defence and filing the written statement on the appointed date of hearing without waiting for the arrival of the date*

appointed in the summons for his appearance in the Court. The extension of time sought for by the defendant from the court whether within 30 days or 90 days, as the case may be, should not be granted just as a matter of routine and merely for asking more so, when the period of 90 days has expired. The extension can be only by way of an exception and for reasons assigned by the defendant and also recorded in writing by the Court to its satisfaction. It must be spelled out that a departure from the time schedule prescribed by Order VIII, Rule 1 of the Code was being allowed to be made because the circumstances were exceptional, occasioned by reasons beyond the control of the defendant and such extension was required in the interest of justice, and grave injustice would be occasioned if the time was not extended.

42. A prayer seeking time beyond 90 days for filing the written statement ought to be made in writing. In its judicial discretion exercised on well-settled parameters, the Court may indeed put the defendants on terms including imposition of compensatory costs and may also insist on affidavit, medical certificate or other documentary evidence (depending on the facts and circumstances of a given case) being annexed with the application seeking extension of time so as to convince the Court that the prayer was founded on grounds which do exist.

43. The extension of time shall be only by way of exception and for reasons to be recorded in writing, howsoever brief they may be, by the court. In no case, the defendant shall be permitted to seek extension of time when the court is satisfied that it is

a case of laxity or gross negligence on the part of the defendant or his counsel. The court may impose costs for dual purpose: (i) to deter the defendant from seeking any extension of time just for asking and (ii) to compensate the plaintiff for the delay and inconvenience caused to him.

44. However, no straitjacket formula can be laid down except that the observance of time schedule contemplated by Order VIII Rule 1 shall be the rule and departure therefrom an exception, made for satisfactory reasons only. We hold that Order VIII Rule 1, though couched in mandatory form, is directory being a provision in the domain of processual law."

7.The submission advanced by Mr.Mishra that this Court by passing an order to ditter the petitioner and to compensate plaintiff, can pass and should pass appropriate orders permitting the petitioner-

defendant to file written statement is not found sustainable because this is not a case of some delay caused in filing the written statement on account of no fault of the otherside.

8. For the sake of argument if the say of Mr.Mishra is accepted then the implied effect would be very serious and it may protract the hearing of the Civil Suit which is pending since 1997. I am told by the learned counsel appearing for respondent that after completion of the evidence of the plaintiff's side, as the ld.Civil Judge was not dealing with the matter meticulously, the respondent-orig.plaintiff was compelled to approach this Court by moving a petition i.e. Special Civil Application No.13367 of 2005. It is submitted that because of the orders passed by this Court in the said petition, the ld.Civil Judge started further proceedings. Now if this Court grants permission to file a written statement, it may lead to recasting of issues framed and some compulsion on the plaintiff to lead evidence to meet with the issues that may be framed on account of written

statement that may be filed by the otherside and it also shall automatically give right to the defendant to lead evidence after the closure of such right. The case before the Court in Kailash (supra) is a case of election and the delay was of only 05 days after 90 days. In the present case, there is no element of violation of principles of natural justice because the defendant in the present case with the reasons best known to the company has not cared to even watch the proceedings of the Suit of a very huge amount. Ultimately, the constituted attorney or authorised person could have informed the defendant-company that he has never been called in the Suit to file written statement either by the advocate or by the officer attending the legal matters in the Court of law. This Court even cannot ignore that the xerox copy of the written statement shown to the Court bears the date 10th September, 2003. So it would be difficult for this Court to accept that the same was ready and could not be tendered in time before the Court because of some mistake committed by the clerk.

9.In view of above discussion and observations, it appears that the impugned order passed by ld.Civil Judge below application Exh.103 is absolutely legal and no judicial review or interference is warranted. The petition, therefore, is hereby dismissed and Civil Application praying for interim relief cannot survive and therefore, the same is also hereby dismissed. The interim relief granted earlier stands vacated so far as Civil Application is concerned. Rule is discharged in both the matters.

(C.K. Buch, J)

Aakar